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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1772

CHAIM KAHAN,
SOLOMON WERCBERGER
AND
MOR WERCBERGER,
Petitioners,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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1. In our initial brief, we contended, *inter alia*, that the recitals in the affidavit in support of the search warrant in this case were clearly insufficient under the established Fourth Amendment standards for probable cause. Pet. at 11-14. Although our first argument — filed prior to this Court's ruling in *Franks v. Delaware*, 98 S. Ct. 2674 (1978) — focussed on the standard of culpability required to invalidate a warrant based upon a false affidavit, our alternative argument — that the affidavit was inadequate on its face, even apart from its falsity — was equally compelling. The government's response asserts that the first issue need "no longer" be resolved in light of the *Franks* decision. Brief in Opp. at 4 n.4. It then asserts, in totally conclusory terms, that the affidavit was sufficient under the "common sense and realistic" test of *United States v. Ventresca*, 380

U.S. 102 (1965). *Id.* at 5-6. A precise examination of the facts refutes the government's assertion.

2. The factual recitals set forth in the warrant to search petitioners' warehouse — reduced to their relevant essentials — established only that on March 11, 1975, 6,910 cartons of Schick razors and toilet products were stolen while being shipped from Schick, Inc., West Haven, Connecticut, to Anaheim, California, and that on March 12, 1975, a "reliable informant observed several thousand cartons of Schick super two bonded razors bearing the Schick, Inc., Spec. No. 02-40 on the cartons." Pet. App. E at 32a-33a. Despite the government's contention to the contrary,[1] absolutely nothing in the affidavit connected even the specification number alleged to have been on the cartons in the petitioners' warehouse with the stolen Schick razors and toilet products. Moreover, the government agrees that the specification number itself only "identified the product and not the hijacked shipment." Brief in Opp. at 5.

[1]The government in its statement of facts asserts that the affidavit supporting the search warrant: "stated that 6,910 cartons of Schick razors bearing the product number 02-40 had been hijacked on March 11, 1975 . . ." Brief in Opp. at 3. This is not so. In the portion of the affidavit setting forth "the facts tending to establish the grounds for the issuance for a search warrant . . ." the sole description of the goods which the FBI was told were stolen is that of "6,910 cartons of Schick razors and toilet products which cartons were being shipped from the Schick, Inc., West Haven, Connecticut to Anaheim, California," Pet. App. E at 32a-33a. The deponent in the affidavit recites in a preliminary paragraph that he "has reason to believe that there is presently being concealed in [petitioners'] premises a quantity of cartons bearing the name Schick, Inc. with the Spec. No. 02-40 on the said cartons *which cartons have been stolen from interstate commerce in violation of Title 18, United States Code Section 659.*" But there is not a single factual recital anywhere in the affidavit supporting any basis for believing that the stolen merchandise itself had the Spec. No. 02-40. And the affidavit was the *only* evidence submitted to the magistrate who issued the warrant. Appellant's App. at 125a. Therefore, the warrant must stand or fall solely on the contents of the affidavit. *See* Pet. at 11, and cases cited therein.

In *Franks v. Delaware*, 98 S. Ct. 2674, 2681 (1978), this Court spoke of the requirement that "a warrant affidavit . . . set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter." In the context of a search warrant alleging the presence of stolen goods there must be particular facts to believe that the goods thought to be present at the location to be searched are, in fact, those which were stolen. *See* Pet. at 11, 13. The government argues here that the affidavit did make the requisite connection between the goods on the premises to be searched and the goods actually stolen by virtue of "the proximity of time and place" (Brief in Opp. at 5), the assertion that "the quantity of razors observed at the warehouse on the day following the hijacking was extraordinary" (*id.* at 6, *quoting from* opinion below), and the reference in the affidavit to the "type" of "products" (*id.* at 5-6 n.6, *quoting from United States v. Roth*, 391 F.2d 507, 511 (7th Cir. 1968)).

But nothing in the affidavit established "proximity of place." The sole geographic reference for the place of theft given by the affidavit was the statement that the goods were stolen while "being shipped from the Schick, Inc. West Haven, Conn. to Anaheim, California." Pet. App. E at 33a. The report of theft came from an employee of the trucking company located in Secaucus, New Jersey, but nothing in the affidavit established that the theft itself occurred in New Jersey.[2]

[2]Even if the reference to the location of the reporting employee is taken as establishing the location of the theft, that only means that the geographic range established on the face of the affidavit was limited to the area between Secaucus, New Jersey and Brooklyn, New York. That geographic range encompasses one of the largest and most densely populated commercial and metropolitan regions of the country; since the product in question (*i.e.*, Schick razors) is a widely distributed and nationally advertised product, such a geographic range hardly constitutes "proximity of place."

Nor did anything in the affidavit establish that "several thousand cartons of Schick" razors constituted an "extraordinary" number of razors to find in a warehouse. Indeed, in the instance of a nationally distributed and nationally known brand of products such as Schick razors, one would expect to find several thousand cartons of Schick razors located in many different distribution locations in every metropolitan region of the country. Obviously, if 6,910 cartons of Schick razors were being shipped from West Haven, Connecticut, to Anaheim, California, they were to be stored in a warehouse at their ultimate destination. Would their presence at that intended warehouse have been sufficiently "extraordinary," standing alone, to justify a search of those premises based on a report of theft of several thousand cartons of Schick razors somewhere else in California?

Finally, the assertion of significant "proximity of time" has no significance in light of the fact that the warehouse here in question was in a large metropolitan area. Simply put, it is a safe assumption that the day after the hijacking in question, there were many locations in the Greater New York — New Jersey metropolitan area having "several thousand" cartons of Schick razors. If the court of appeals in this case is right, every single one of those locations was subject to a search without any further factual recital in the supporting affidavits.

3. The government's attempted distinction of *United States v. Roth*, 391 F.2d 507 (7th Cir. 1968), fails. *See* Brief in Opp. at 5-6 n.6. In *Roth*, approximately 3,000 Hamilton Beach blenders were stolen on or about October 29, 1965. 391 F.2d at 508. According to the FBI agent's affidavit, on October 31, 1965, he was informed by a confidential informant that "*the said electric blenders* [the stolen items]" were on the premises. *Id.* at 509. It actually turned out that the informant had said there was "a load of Hamilton Beach *products*" on the premises. *Id.* The *Roth* court thus

carefully scrutinized the remainder of the affidavit to see if sufficient particularity was present to connect the goods described on the premises to be searched with the goods alleged to have been stolen. In the course of distinguishing this Court's earlier decision in *Ventresca v. United States*, 380 U.S. 102 (1965), the *Roth* court stated: "Neither the date on which Noonan observed the defendant's premises nor the type of Hamilton Beach products he observed was recited in the affidavit." 391 F.2d at 511. This is the portion of the opinion extracted in the government's opposition brief in this case at footnote 6. But the *Roth* court went on to observe:

> Both of these omissions are highly critical in view of the nature of the premises, a "garage-type warehouse," and the type of merchandise stolen, a product that is mass produced by a nationwide manufacturer of a variety of household electrical appliances. Without detailing the date of Noonan's [*i.e.*, the FBI agent's] observation and what he specifically saw, Morrison's [*i.e.*, the affiant's] statement might have described any of a large number of warehouses that had received a shipment of Hamilton Beach products prior to or contemporaneously with the theft of the blenders in question. The statement, therefore, is too imprecise to establish probable cause that what Noonan observed on the defendant's premises was the stolen blenders.

Id.

Hamilton Beach blenders are, of course, "a product that is mass produced by a nationwide manufacturer." Hence the magistrate applying the Fourth Amendment would not have been able to distinguish the "garage-type warehouse" the FBI wanted to search from the many other similar locations legitimately possessing a large quantity of Hamilton Beach blenders. The court in *Roth* was demand-

ing not merely a generic description of the type of mass-produced and mass-distributed product which was stolen, but some sort of specific product identification connecting the goods on the premises with "the stolen blenders." *Compare United States v. Ventresca*, 380 U.S. 102 (1965). This is precisely what the government concedes is lacking in the instant case.

4. The government also fails even to discuss *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976), *cert. denied*, 431 U.S. 969 (1977), relied upon in our petition at page 13. In *Galante*, the affidavit in support of the search warrant recited the respective dates of the theft and the observation of the goods in question on the premises to be searched as well as product-type of the goods stolen and the goods observed on the premises in question (*i.e.*, Nikkor Camera Lens). *See* 547 F.2d at 736 n.1. Applying its prior decision in *United States v. Karanthanos*, 531 F.2d, (2d Cir.) *cert. denied*, 428 U.S. 910 (1976), the *Galante* court stated that the search was conducted under an invalid warrant, "a point conceded by the government" because the affidavit fails to "set forth the basis upon which the informant believes the activity to be criminal." *See* 547 F.2d at 736 n.1. Although the *Galante* court went on to affirm the conviction on the theory that the chain of causation between the search of the premises and the ultimate seizure of the goods was broken by a number of independent intervening causes, it is apparent that in *Galante* at least the court believed the affidavit itself insufficient under Fourth Amendment standards to establish probable cause.

CONCLUSION

We believe the government has failed to produce a single case which fairly supports the affidavit which the lower court here sustained.[3] For the reasons stated herein and in our original petition, the writ of certiorari should be granted.[4]

Respectfully submitted,

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[3]The only other case on which the government significantly relies on this point is *Vitali v. United States*, 383 F.2d 121, 122 (1st Cir. 1967). We believe we have distinguished *Vitali* in our original petition at page 13.

[4]At the very least, this case should be vacated and remanded in light of this Court's decision in *Franks v. Delaware*, 98 S. Ct. 2674 (1978). This Court held in *Franks* that affidavits containing material misstatements of fact made deliberately or with reckless disregard for the truth are invalid under the Fourth Amendment. Here the court of appeals noted the district court's finding of non-negligence in making the misstatement, but carefully confined its own opinion to the conclusion that "the record requires the conclusion that the misstatement was not intentional" and that "negligence or, very likely, something going beyond simple negligence" is necessary to invalidate a warrant. *See* Pet. App. E at 16a-17a. We think the issue of possible recklessness is thus left open under the court of appeals opinion, an issue fairly encompassed by Petitioner's briefs below. *See* Reply Brief for Defendants-Appellants In No. 77-1216 at 16-20.